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NO. 82-646

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

SIDNEY HERSH YATEMAN, APPELLANT

v.

BARBARA LEE YATEMAN, APPELLEE

ON APPEAL FROM THE COURT OF APPEAL

OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

MOTION OF APPELLEE,

BARBARA LEE YATEMAN,

TO DISMISS OR AFFIRM

WILLIAM B. DANIELS, ESQ.
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ATTORNEYS FOR APPELLEE

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FIRST APPELLATE DISTRICT, DIVISION THREE

MOTION OF APPELLEE, BARBARA LEE YATEMAN, TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeal of California on the grounds that: (1) the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on by the Court; and (2) that the judgment rests on an adequate nonfederal basis.

BASES FOR THE MOTION

I. THE PORTION OF THE TRIAL COURT JUDGMENT IN ISSUE WAS STIPULATED TO BY THE APPELLANT; HE FAILED TO TIMELY APPEAL THAT PORTION AND HE FURTHER FAILED TO MOVE TO SET IT ASIDE ON APPROPRIATE GROUNDS AND WITHIN THE TIME REQUIRED BY STATE LAW.

II. THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NOT TIMELY OR PROPERLY RAISED.

III. THE JUDGMENT RESTS ON ADEQUATE NONFEDERAL BASIS.

IV. CONCLUSION

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Beaty v. Richardson (1927), 276 U.S. 599, 48 S.Ct. 320, 72 L.Ed. 24 — 7

Eerie Railway Company v. Purdy (1901), 185 U.S. 148, 22 S.Ct. 605, 46 L.Ed. 847 — 6

Ferguson v. Georgia (1961) 365 U.S. 570, 572, 81 S.Ct. 756, 5 L.Ed. 2d 783 — 6

Fox Film Corporation v. Muller (1935), 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 — 11

Herndon v. Georgia (1934), 295 U.S. 441, 443, 55 S.Ct. 794, 79 L.Ed. 1530 — 7

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Palmer v. Long Beach (1948) 33 Cal.2d 134, 142, 199 P.2d 952 — 7

Pennsylvania Railroad Company v. Illinois Brick Company (1935), 297 U.S. 447, 462-463, 56 S.Ct. 556, 80 L.Ed. 796 — 6

Swenson v. File (1973), 3 Cal.3d 389, 393, 90 C.R. 580, 475 P.2d 852 — 10

STATUTES CITED:

California Civil Code §4800 — 5, 8

California Code of Civil Procedure §473 — 2, 4, 5

I.

THE PORTION OF THE TRIAL COURT JUDGMENT IN ISSUE WAS STIPULATED TO BY THE APPELLANT; HE FAILED TO TIMELY APPEAL THAT PORTION AND HE FURTHER FAILED TO MOVE TO SET IT ASIDE ON APPROPRIATE GROUNDS AND WITHIN THE TIME REQUIRED BY STATE LAW.

The trial leading to the Interlocutory Judgment before the Honorable E. J. Leach, Jr., began on August 24, 1978, with an assertion by the Appellant's counsel that certain matters were stipulated to concerning the issues in the case. Among them was "the military retirement of the respondent, Sidney Yateman."

After the Appellant confirmed the date of his graduation from West Point, Appellee's trial counsel, Mr. Piggott, stated:

> Mr. Piggott: 3 June 1959 is the date that should be used to calculate retirement and community property.

> Mr. Bebermeyer: Our position is slightly to the contrary. We take into account that two years for pay purposes which will have total 22 years and take the percentage thereof and we come out with 42.163% being Mrs. Yateman's interest in the retirement when he does retire.
>
> Mr. Piggott: With ours it becomes 46.875%. We would ask the court to retain jurisdiction. I believe we will be able to work out when we find out exactly how the Army calculates it.

The Interlocutory Judgment was filed on November 15, 1978.

The Appellant's first appeal from that judgment followed, but no objection concerning his military pension was included among the issues. The Appellate Court rendered and filed its decision on November 29, 1979.

Thereafter, Appellant filed a motion to set aside the Interlocutory Judgment pursuant to California Code of Civil Procedure, §473. His claim of "mistake,

inadvertence, surprise or excusable neglect" was based on his declaration under penalty of perjury in which he said:

> I was adamant that all military retirement benefits were my separate property and agreed to the stipulation only because at the time the California Supreme Court had held in In Re Marriage of Fithian that such benefits were divisible because such division did not interfere in any way with the administration or goals of the federal military retirement pay system. Recent developments in the law and research has proven otherwise. I further detrimentally relied on the improper holdings of the California Courts that retirement benefits which had not yet vested at time of dissolution of marriage were also divisible, as expressed in In Re Marriage of Brown. Again, recent developments in the law and extensive research has indicated that such a holding is improper and that the California law dealing with military retirement benefits is void on its face because it interferes with the objectives or requirements of the federal retirement pay system. At the time of

> trial, no case of similar nature had been heard by the U.S. Supreme Court overruling the California decisions regarding the community property interpretation for retirement benefits. However, the California Supreme Court has been overruled subsequently in Hisquerdo v. Hisquerdo, 99 S.Ct. 802, decided January 22, 1979.

In response to Appellant's motion, the court found that the evidence is "insufficient to support the finding of entitlement to relief pursuant to Code of Civil Procedure, Section 473." That sentiment was confirmed upon Appellant's second appeal to the First Appellate District when the Court affirmed the trial court saying:

> Since Sidney failed to raise the status of his military retirement on his original appeal from the Interlocutory Judgment of Dissolution of Marriage, he waived any subsequent right to appeal the issue. We also note that the Interlocutory Judgment of Dissolution was entered November 15, 1978. His motion was filed December 12, 1979. Under Section 473 it was not timely filed.

On November 18, 1981, Appellant filed a complaint in the Monterey County Superior Court, Case Number 77562, against his trial lawyer, Mr. Bebermeyer, alleging malpractice.

II.

THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NOT TIMELY OR PROPERLY RAISED.

While Appellant's jurisdictional statement asserts that the Statute in issue is California Civil Code, Section 4800, it is obvious from his materials that it is not. The Appellant's frustration focuses primarily on California Code of Civil Procedure, Section 473, which in pertinent part provides:

> The Court may, upon such terms as may be just, relieve a party or his or her legal representative from a judgment, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other

> pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months after such judgment, order, or proceeding was taken...(emphasis added)

A litigant must follow the procedures in raising federal questions. Any failure to do so is fatal to his chances for Supreme Court review. In Re Lampkin (1957), 355 U.S. 59, 78 S.Ct. 137, 2 L. Ed.2d 107; Ferguson v. Georgi (1961), 365 U.S. 570, 572, 81 S.Ct. 756, 5 L.Ed.2d 783. If reasonable state procedural requirements are not observed, this court will generally decline to exercise jurisdiction. Pennsylvania Railroad Company v. Illinois Brick Company (1935), 297 U.S. 447, 462-463, 56 S.Ct. 556, 80 L.Ed. 796; Eerie Railway Company v. Purdy (1901), 185 U.S. 148, 22 S.Ct. 605, 46 L.Ed. 847. Moreover, apart from the issue of timeli-

ness for purposes of Section 473, the fact that the propriety of the stipulation dividing Appellant's military pension was not raised on Appellant's first State Court appeal is a basis for dismissal of this appeal as well. Failure to follow the state appellate channel is fatal to the chances for Supreme Court review. The Appellant should be deemed to have waived the federal issue and there will be no basis for the assertion of the Court's jurisdiction. Herndon v. Georgia (1934), 295 U.S. 441, 443, 55 S.Ct. 794, 79 L.Ed. 1530; Beaty v. Richardson (1927), 276 U.S. 599, 48 S.Ct. 320, 72 L.Ed. 24.

III.

THE JUDGMENT RESTS ON ADEQUATE NONFEDERAL BASIS.

With respect to the military retirement, the Interlocutory Judgment was a stipulated judgment. In California, stipulations are contracts. Palmer v. Long Beach (1948), 33 Cal.2d 134, 142, 199 P.2d 952. Stipu-

lations are liberally construed so as to encourage and facilitate the settlement of controversy or of procedural disputes. Jackson v. Puget Sound Lumber Company (1898), 123 Cal. 97, 155 P.2d 788.

The State Statute which the Appellant purports to attack acknowledges the significance of stipulations in the disputes concerning marital property. California Civil Code, Section 4800, in part states:

> Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, the court shall...divide the community property and quasi-community property of the parties... equally. (emphasis added)

Such a stipulation is the basis for the division of pension benefits in this case; yet, nowhere in his pleadings does the Appellant identify any federal basis to object to that portion of Section 4800(a) dealing with stipulations.

Section 4800(a) reflects a strong

State policy related to contracts for lawsuit settlement and a parallel interest to ensure that contractual obligations voluntarily undertaken cannot be avoided on irrelevant bases, such as a subsequent change in the law.

If a "change in the law" were a basis for rescission of contracts, a host of unjust consequences might result. For example, would an increase in legal interest rates permit a seller to rescind a fixed interest contract of sale with a buyer? Should a seller of property which subsequent to sale becomes subject to liberalized zoning requirements, be entitled to rescind on the basis of mistake?

It is exactly that type of unjust consequence which the Appellant seeks to impose upon the Appellee in this case.

It has been a longstanding proposition in California that laws enacted subsequent to the execution of an agreement are not

deemed to be part of the agreement and the parties are presumed to have had existing law in mind at the time of the agreement. Swenson v. File (1973), 3 Cal. 3d 389, 393, 90 C.R. 580, 475 P.2d 852.

In In Re Marriage of Mahone (1981), 123 Cal.App.3d 17, 176 C.R. 274, the Court stated:

> It does not follow, however, that Husband should be relieved of the trial stipulation by reason of the McCarty decision. The written stipulation was filed with the trial court January 5, 1978. As of that date it was settled California law that a federal military retirement pension was subject to division as community property, and the United States Supreme Court had not indicated to the contrary. (In Re Marriage of Fithian, 10 Cal.3d 592, 111 C.R. 369, 517 P.2d 449, cert. den., 419 U.S. 825, 95 S.Ct. 41, 42 L.Ed.2d 48 rehg. den. 419 U.S. 1060, 95 S.Ct. 644, 42 L.Ed.2d 657.) The stipulation was in accordance with the law as it then stood, and Husband is not entitled to relief from the stipulation

merely because the law was subsequently changed by judicial decision. (See Cooley v. County of Calaveras, 121 Cal. 482, 485-486, 53 P. 1075; Campbell v. Rainey, 172 Cal. App. 747, 749-750, 17 P.2d 310; Mitchel v. National Auto and Casualty Insurance Company, 38 Cal.App.3d 599, 603-605, 113 C.R. 391; Zeppi v. State of California, 203 Cal.App.2d 386, 388, 21 C.R. 534.

No clearer assertion of the law of the State of California and the adequacy of the state ground for decision can be found.

The Supreme Court has consistently adhered to the principle that it will not review a State Court judgment based on an adequate, independent, nonfederal state ground. Murdock v. Memphis (1874), 20 Wall 590, 636, 22 L.Ed. 429; Fox Film Corporation v. Muller (1935), 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158.

IV.

CONCLUSION

Appellant's suit against his trial

attorney demonstrates his conviction that the problem he alleges concerning the stipulated judgment in this case is to be resolved under State law. Appellant's Jurisdictional Statement is one more frivolous effort to evade the contractual responsibilities he undertook in open court on August 24, 1978. The Appellee respectfully moves the Court to dismiss this appeal, or in the alternative, to affirm the judgment entered in the cause by the Court of Appeal of California, First Appellate District, Division Three.

DATED: December 23, 1982.

Respectfully submitted,

HEISLER, STEWART & DANIELS, INC.

By_____
WILLIAM B. DANIELS

PROOF OF SERVICE BY MAIL

I, the undersigned, declare:

I am a citizen of the United States, employed in Monterey County, State of California. I am over the age of 18 years and not a party to the within cause. My business address is 563 Figueroa Street, Monterey, California, 93940. On December 23, 1982, I served the within MOTION OF APPELLEE, BARBARA LEE YATEMAN, TO DISMISS OR AFFIRM, on the parties named below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Monterey, California, addressed as follows:

Clerk of the Court of Appeal
First Appellate District
Division Three
4154 State Building
Civic Center
San Francisco, CA 94102

Attorney General (3)
State of California
6000 State Building
San Francisco, CA 94102

Honorable Nat A. Agliano
Judge of the Superior Court
1200 Aguajito Road
Monterey, CA 93940

Sidney H. Yateman (3)
1031 Parkway Drive
Pebble Beach, CA 93953

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on December 23, 1982, at Monterey, California.

SARAH STERN

NOTE

The original documents of which the following are reproductions contained numerous typographical errors.

No effort has been made to correct them.

APPENDIX A

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MONTEREY

BEFORE HONORABLE E. J. LEACH, JR., JUDGE

---o0o---

In Re the Marriage of	)	
	)	
Petitioner: BARBARA LEE YATEMAN,	)	No.
	)	
and	)	MDR
	)	
Respondent: SIDNEY HERSH YATEMAN.	)	10439
	)	

TRANSCRIPT OF PROCEEDINGS

Courthouse, Salinas, California

August 24, 1978

---o0o---

APPEARANCES:

For the Petitioner:	For the Respondent:
L. PATRICK PIGGOTT, Esq.	Reith,Wellington,and Bebermeyer, by ROBERT BEBERMEYER, Esq.

C.S.R. No. 995

BRAY & O'DALY
Certified Shorthand Reporters
Monterey County
Salinas,California

THE COURT: In the marriage of Yateman, this is the time for trial.

MR. BEBERMEYER: Ready for the respondent, Your Honor.

MR. PIGGOTT: Ready for the petitioner, Your Honor.

MR. BEBERMEYER: We have stipulated on certain matters, Your Honor, concerning some of the issues in the case. I would like to recite those for the purpose of the court record and for your information and edification.

MR. PIGGOTT: First we have agreed to stipulate it will be a closed hearing so that the children are outside and not involved. Is that correct?

MR. BEBERMEYER: That is correct.

THE COURT: All right.

MR. BEBERMEYER: The stipulated matters include the following: Number 1, related to child custody, that Jennifer

Helen Yateman, born March 5, 1962, aged sixteen, physical custody be awarded to respondent, Sidney Yateman, with reasonable rights of visitation to petitioner, Barbara Yateman. The child Jill Carli Yateman, born March 8, 1964, age fourteen, physical custody be awared to petitioner, Barbara Yateman, with reasonable rights of visitation to the respondent, Sidney Yateman.

The community property disposition is as follows: 1031 Parkway Drive, Pebble Beach, California is awared to the respondent Sidney Yateman. There has been an agreed fair market value of this residence at the time of trial of $140,000.00 and there are agreed encumbrances against said residence in the sum of $53,002.46. This figure leaves a net equity of $86,997.54. One half of that equity, of that net equity, which is the sum of $43,498.77 is to be paid by petitioner --

excuse me, to be paid by respondent Sidney Yateman, to the petitioner, Barbara Yateman at the time of entry of interlocutory decree.

MR. PIGGOTT: Well, we have stipulated she'll receive some but we are not insisting on immediate payment if that is going to hamper his ability to make support payments, is how the stipulation should state. We would agree that would be the sum of the community property division.

MR. BEBERMEYER: The military retirement of the respondent, Sidney Yateman. The following dates are pertinent for calculation of community interest therein. Mr. Yateman entered the service October 13, 1957; the date of marriage of the parties was June 14, 1959 and separation date of the parties is as alleged by petitioner, March 13 1968, and as alleged by respondent, February 25, 1978. There

is a difference of about three weeks time.

MR. PIGGOTT: You referred to that March date as '68, you meant '78.

MR. BEBERMEYER: Excuse me, '78, Your Honor.

MR. PIGGOTT: There is one problem with those dates, Your Honor. The retirement of Mr. Yateman is based on twenty years active duty service as an officer. He gradudated from military academy in June 1959, although he'll get credit as to the amount of retirement for those two years of National Guard active duty. They do not count on the years that he had to complete before he could retire towards the community property and we'll have to work out that exact percentage later and we would ask the court to reserve jurisdiction on that, but the date -- what was the exact date of graduation, do you know.

MR. YATEMAN: 3 June '59.

MR. PIGGOTT: 3 June '59 is the date

that should be used to calculate retirement and community property.

MR. BEBERMEYER: Our position is slightly to the contrary. We take into account the two years for pay purposes which will have totaled twenty two years and take the percentage thereof and we come out with 42.163 per cent being Mrs. Yateman's interest in the retirement when he does retire.

MR. PIGGOTT: With our's it becomes 46.875 per cent. We would ask the court to retain jurisdiction. I believe we will be able to work it out when we find out exactly how the army calculates it.

MR. BEBERMEYER: We have undeveloped real property in Wilton, Connecticut as listed on the pleadings. That property is to be sold at the earliest possible date and the net proceeds of the sale to be divided equally.

The respondent has agreed to con-

tinue to make the tax payments thereon and is to receive credit for all sums accruing after the entry of interlocutory decree.

The automobiles of the parties: the respondent is to receive the Mercury Station-wagon; the petitioner to receive the Volks-wagen automobile and we are agreed that the approximate value of those vehicles is $1,000 each.

The household goods and furnishings and jewelry of the parties has not yet been appraised and we will have that appraised and if possible divided pursuant to agree-ment of the parties. We ask the court to retain jurisdiction, if necessary, if equal division cannot be affected.

The insurance of the parties likewise, or the insurance of Mr. Yateman, we do not have an exact figure on the cash surrender value; it's somewhere between $1,500 and $4,000 and when that is determined the respondent will pay one half of the cash

value of that insurance to the petitioner, Mrs. Yateman. And there again we ask the court to retain jurisdiction to make a determination in that regard, if necessary.

MR. PIGGOTT: Mr. Bebermeyer will provide my office with statements from the different insurance companies as to the cash value.

MR. BEBERMEYER: As to the beneficiaries of said policies, the husband, Colonel Yateman, respondent, has agreed both daughters shall be beneficiaries of at least $10,000.00 worth of life insurance on his life until such time as the daughters reach the age of majority.

THE COURT: Total of ten.

MR. BEBERMEYER: Ten on each, Your Honor.

THE COURT: All right.

MR. BEBERMEYER: We have an item of several community debts which are still unresolved and we ask the court to retain

jurisdiction on those, one of which might ultimately be covered by the CHAMPIS program.

MR. PIGGOTT: Want to list them.

MR. BEBERMEYER: Dr. Crines, $720 -- $792. Dr. Stancil Johnson $161, and I believe -- is there a dental bill for one of the daughteres?

MR. PIGGOTT: We don't know of any outstanding dental bill but Colonel Yateman has it listed on his financial statement.

MR. YATEMAN: There's one for general surgery and one for Jill's retainer and positioner.

MR. PIGGOTT: Approximate total is $400.

MR. YATEMAN: Bobbie should know, the retainer positioner is probably $400 alone.

MR. BEBERMEYER: We have agreed there will be a mutual restraining orders from being in and about the residence of the

other except upon reasonable notice for visitation purposes and with permission. Telephone communication with the respective daughters be limited to the hours of eight a.m. to eight p.m.

The remaining issues as agreed to by the attornies include the issue of spousal support, child support. The maintenance -- number 2, the maintenance of the children on private insurance in the event, for any reason, the government should fail to cover dependents of retired personnel.

Number 3, the maintenance of any life insurance by the petitioner -- by the respondent for any support period awarded.

Number 4, the filing of the 1978 federal and state tax return be joint or singly and entitlement to deduction thereon.

Number 5, attorney's fees and court costs.

THE COURT: All right.

MR. BEBERMEYER: I think that covers it.

MR. PIGGOTT: Yes, We stipulate to what has been stated by Mr. Bebermeyer, that may be entered as part of the interlocutory order. Though those are the remaining issues, there's also the remaining issue of maintaining life insurance on Mrs. Yateman.

MR. BEBERMEYER: I mentioned that.

MR. PIGGOTT: Did you mention attorney's fees?

MR. BEBERMEYER: Yes, I did.

MR. PIGGOTT: That's what we are going to proceed on.

THE COURT: Call your first witness.

MR. PIGGOTT: I call Mrs. Yateman.

APPENDIX B

REITH, WELLINGTON & BEBERMEYER
Attorneys at Law
444 Pearl Street
Post Office Box 188
Monterey, California 93940
Telephone: 375-3181

Attorneys for Respondent

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MONTEREY

In re the marriage of	) No.
	)
Petitioner: BARBARA LEE YATEMAN	) MDR 10439
	)
and	)
	)
Respondent: SIDNEY HERSH YATEMAN	)
	)

DECLARATION OF RESPONDENT, SIDNEY HERSH YATEMAN, UNDER PENALTY OF PERJURY IN SUPPORT OF MOTION TO SET ASIDE THAT PORTION OF INTERLOCUTORY AND FINAL DECREES IN WHICH JURISDICTION WAS RETAINED OVER MILITARY RETIREMENT BENEFITS BY CHARACTERIZING THEM AS COMMUNITY PROPERTY UNDER C.C.P. § 473

DECLARATION OF RESPONDENT
SIDNEY HERSH YATEMAN
UNDER PENALTY OF PERJURY

At the time of the dissolution hearing, a stipulation was entered into between the

the parties which enabled the court to retain jurisdiction over my military benefits and treated them as community property. (pages 2 and 3 - transcript of trial court proceedings) I was adamant that all military retirement benefits were my separate property and agreed to the stipulation only because at that time the California Supreme Court had held in Re Marriage of Fithian that such benefits were divisible because such division did not interfere in any way with the administration or goals of the federal military retirement pay system. Recent developments in the law and research has proven otherwise. I further detrimentally relied on the improper holdings of the California Courts that retirement benefits which had not yet vested at time of dissolution of marriage were also divisible, as expressed In Re Marriage of Brown. Again, recent developments in the law and

extensive research has indicated that such a holding is improper and that the California law dealing with military retirement benefits is void on its face because it interfers with the objectives or requirements of the federal retirement pay system. At the time of trial, no case of similar nature had been heard by the U.S. Supreme Court overruling the California decisions regarding the community property interpretation for retirement benefits. However, the California Supreme Court has been overruled subsequently in Hisquerdo v. Hisquerdo, 99 SCt 802, decided January 22, 1979. Also the enlightened California Second abstract Court of Appeal, using the holding in Hisquierdo, to include the fact that the California Courts had ignored recent legislation which clarifies the federal retirement pay system, ruled in Re Marriage of Milhan, 97 CalApp 3d 41 on September 19, 1979, that military retirement pay was sep-

arate property. Additionally, the same court said In Re the Marriage of Orr, 157 Cal.Rptr. 301 on July 30, 1979, that the California Supreme Court holding in Re Marriage of Stenquist was not the latest word on community interest in federal benefits. Accordingly, that portion of the stipulation entered into while these cited cases were pending with regard to retirement pay being community property and the courts retaining jurisdiction for division of same, is void on its face. At the very least, in the alternative, the California law, as currently defined, is mistated.

Also, it should be noted that I am not now nor ever have been a resident of California, that I am on active duty in the military service, and am subject to California jurisdiction only by virtue of my military assignment within the state.

On June 13, 1979, the dissolution of my marriage became final and this motion is within six months of that decree. During this time prior legislation has been clarified and new judicial holdings have been made which have a bearing on my case. Therefore, I request the court to vacate that portion of my inter-locutory and final decrees as relates to military retirement by deleting any reference to retention of jurisdiction by the court to divide future military retirement benefits as community property. Additionally, I request that the court modify said decrees by affirming that my military retirement benefits are my separate property.

I declare that the foregoing is true under penalty of perjury.

Dated: January 31, 1980

/s/ Sidney Hersh Yateman
Sidney Hersh Yateman

APPENDIX C

SIDNEY H. YATEMAN
1031 Parkway Drive
Pebble Beach, CA 93953
(408) 375-4221

FILED
Nov 18 8 55 AM'81
Ernest A.Maggini
Monterey County Clerk
/s/ Deputy

Plaintiff
In Pro Per

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MONTEREY

SIDNEY H. YATEMAN, Plaintiff, vs. BLACK and RED CORP.; REITH, BEBERMEYER, & WIEBEN, ATTORNEYS AT LAW; DOES I through V, inclusive, Defendants.	No. 77562 COMPLAINT FOR DAMAGES FOR MALPRACTICE

Plaintiff SIDNEY H. YATEMAN, for cause of action, alleges as follows:

1. At all times mentioned herein, defendant ROBERT R. BEBERMEYER was and still is a resident of Monterey County, California.

2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I through V, inclusive and there-

fore sues these defendants by such fictitious names. Plaintiff will amend this Complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and that plaintiff's losses as herein alleged, were proximately caused by such negligence.) At all times herein mentioned, each of the above named defendants were the agents and employees of their co-defendants, and in doing the things herein alleged, were acting within the course and scope of such agency and employment.

3. At all times herein mentioned, Defendants ROBERT R. BEERMEYER was licensed to engage in the practice of law in the State of California and was practicing law at 444 Pearl Street, Mon-

terey, California.

4. On or about March, 1978, at Monterey, California, Plaintiff retained and employed defendant ROBERT R. BEBERMEYER to represent Plaintiff as Plaintiff's attorney at law in a proceeding for a dissolution of Plaintiff's marriage to BARBARA L. YATEMAN. At such time and place, Defendant accepted such employment and agreed to perform such services for Plaintiff. The above-mentioned proceeding resulted in an interlocutory judgment of divorce on November 15, 1978 and a final judgment of dissolution entered June 13, 1979 in Monterey Superior Court, Case No. 10439. Copies of the interlocutory judgment of divorce and the final judgment of dissolution are attached hereto as Exhibits "A" and "B" respectively. At all times after Plaintiff retained Defendant to represent him in the above-mentioned proceeding, Defendants and each

of them, failed to exercise reasonable care and skill in undertaking to perform such legal services for plaintiff and negligently and carelessly failed to assert plaintiff's separate property interest in his future military pension rights as Plaintiff requested be done. Plaintiff will retire from the Army in 1982 after twenty-three years of Active Duty service and two years of National Guard Service. Plaintiff alleges that his pension payments due to his service in the Army are approximately $1,962.00 a month beginning upon retirement in June 1982. By substantially prejudicing the rights of Plaintiff when defendant insisted that military retirement benefits were community property in the dissolution proceedings, Plaintiff will be required to divide these benefits with his ex-spouse.

5. Defendant negligently failed to

accept the fundamental principle and ethical consideration that the authority to make decisions on the merits of the cause or with regard to the rights of the client is exclusively that of the client (Plaintiff) and if made within the framework of the law, such decisions are binding on the lawyer (Defendant). As a result defendant failed to include plaintiff's future military benefits as separate property in the pleadings, settlement discussions, or settlement agreement but stipulated that such future military benefits were community property and that the court should retain jurisdiction over them.

6. Had defendants exercised proper care and skill in the foregoing matter, plaintiff would receive all of his military pension payments as separate property.

7. As a proximate result of such neg-

ligence by defendants, plaintiff will lose a portion of the military benefits, all to plaintiff's damage in the sum to be shown according to proof.

8. Defendant further was negligent in the manner in which he proceeded with new information provided to him by Plaintiff. When plaintiff became aware of recent development in the law (within six months of the final decree) and insisted that it be used to set aside the portion of the final decree in which jurisdiction was retained over military retirement benefits and in which they had been characterized as community property, defendant advised plaintiff that the appropriate vehicle to present it to the court was by use of CCP 473. Defendant failed to advise plaintiff that a separate evidentiary hearing would have shown that the stipulation was a sham. Defendant further was negligent when he changed sentences in

Plaintiff's statement filed on December 12, 1979 which removed the comments referring to defendants failure to file as separate property originally and substituted words which by-passed that issue.

9. As a proximate result of plaintiff's reliance on statements and representations made to him by defendant, and as a proximate result of confidence and trust reposed by plaintiff in defendant, plaintiff failed to seek any other legal advice regarding the division of future military befefits between the plaintiff and his former wife. At no time either prior to or subsequent to plaintiff's final decree did defendant or any agent of defendant inform plaintiff that plaintiff had a full claim to future military benefits or even a right to claim them until plaintiff insisted that something be done. It was not until October 15, 1981, when plaintiff was told by competent judicial authority that the facts

related above were a matter between client and attorney and not for the courts to resolve with regard to separate property. It became apparent that the stipulation for community property should not have been included in the property settlement agreement. At that time plaintiff discovered the negligence of defendant as set forth herein. Hence, plaintiff's failure to ascertain or discover the negligence of defendant was not due to any lack of diligence on the plaintiff's part.

WHEREFORE, Plaintiff prays judgment against defendants as follows:

1. For damages in an amount to conform to proof;

2. For cost of suit herein incurred;

3. For such other and further relief as the Court may deem proper.

Dated: November 16, 1981

/s/ Sidney H. Yateman

SIDNEY H. YATEMAN

PATRICK PIGGOTT
Attorney at Law
P. O. Box 6448
Carmel, CA 93921
Telephone: (408) 625-0911

FILED
Nov 15 4 35 PM'78
MONTEREY OFFICE
ERNEST A MAGGINI
COUNTY CLERK

Attorney(s) for Petitioner

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MONTEREY

In re the marriage of	) CASE
	) NUMBER
Petitioner: BARBARA LEE YATEMAN	) MDR 10439
	) NOTICE
and	) OF ENTRY
	) OF JUDG-
Respondent: SIDNEY HERSH YATEMAN	) MENT
	) (MARRIAGE)

You are notified that the following judgment in this cause was entered on NOV 15 1978

( ) Pursuant to Section 668.5 of the Code of Civil Procedure

(X) Judgment Book No. 19, Page 904

(XX) Interlocutory Judgment of Dissolution

( ) Final Judgment of Dissolution of Marriage

( ) Final Judgment of Legal Separation

( ) Final Judgment of Nullity

( ) Order on OSC or Motion

( ) Modification

( )

ERNEST A MAGGINI, CLERK

By RICHARD PETTER, Deputy

DECLARATION OF MAILING

On the date stated below, I mailed (by first-class mail or airmail, postage prepaid) a copy of this Notice of Entry of Judgment (Marriage) to the persons entitled thereto, addressed as follows:

BARBARA LEE YATEMAN
c/o Patrick Piggott
P. O. Box 6448
Carmel, Ca.93921

SIDNEY HERSH YATEMAN
c/o Robert Bebermeyer
P. O. Box 188
Monterey, Ca. 93940

Dated NOV 15 1978

ERNEST A MAGGINI,
CLERK

By RICHARD PETTER,
Deputy

NOTICE OF ENTRY OF JUDGMENT (MARRIAGE)

EXHIBIT A

PATRICK PIGGOTT
Attorney at Law
P. O. Box 6448
Carmel, Ca. 93921
Telephone: (408) 6250-0911

ENTERED
NOV. 15, 1978

Attorney(s) for Petitioner

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MONTEREY

In re the marriage of	)CASE
	)NUMBER
Petitioner: BARBARA LEE YATEMAN	)MDR 10439
	)INTERLOCU-
and	)TORY JUDG-
	)MENT OF
Respondent: SIDNEY HERSH YATEMAN	)DISSOLU-
	)TION OF
	MARRIAGE

This proceeding was heard on 8-24-78 before the Honorable E. J. LEACH, Department No. _____.

The court acquired jurisdiction of the respondent on 3-13-78 by:

( ) Service of process on that date, respondent not having appeared within the time permitted by law.

(X) Service of process on that date and respondent having appeared.

( ) Respondent on that date having appeared.

The court orders that an interlocutory judgment be entered declaring that the parties are entitled to have their marriage dissolved. This interlocutory judgment does not consitute a final dissolution of marriage and the parties are still married and will be, and neither party may remarry, until a final judgment of dissolution is entered.

The court also orders that, unless both parties file their consent to a dismissal of this proceeding, a final judgment of dissolution be entered upon proper application of either party or on the court's own motion after the expiration of at least six months from the date the court acquired jurisdiction of the respondent. The final judgment shall include such other and further relief as may be necessary to a complete disposition of this proceeding, but entry of the final judgment shall not deprive this court of its jurisdiction over any matter expressly reserved to it in this or the final judgment until a final disposition is made of each such matter.

The Court further orders both parties to carry out the following terms and provisions of this Interlocutory Judgment:

1. Physical custody of daughter JENNIFER YATEMAN born March 5, 1962, is awarded respondent with reasonable rights of visitation to petitioner.

2. Physical custody of daughter JILL YATEMAN, born March 8, 1964, is awarded petitioner with reasonable rights of visitation to respondent.

3. Respondent receives the Mercury station wagon as sole property while petitioner receives the Volkswagon sedan and both parties agree the value is approximately equal.

4. The real property located in Wilton, Connecticut, shall be placed on the market and sold with the proceeds divided equally between respondent and petitioner. Respondent shall continue to make all tax payments thereon and shall receive credit on such payments at time of sale.

5. Respondent shall maintain a minimum of $10,000.00 life insurance with each daughter as beneficiary until each daughter reaches the age of majority.

6. Each party will pay their own attorney's fees.

7. Respondent shall pay to petitioner child support in the sum of $200.00 per month, beginning September 1, 1978 and payable on the first day of each month until daughter JILL reaches the age of eighteen (18) or is sooner emancipated or deceased.

8. Respondent shall pay to petitioner spousal support in the sum of $550.00 per month, beginning September 1, 1978, and payable on the first day of each month thereafter for the reasonable term of four (4) years, at which time the payment becomes $250.00 per month. Spousal support shall cease upon death of either party or remarriage of petitioner.

9. The communtiy property home located at 1031 Parkway Drive, Pebble Beach, California, is valued at fair market value of $140,000.00 against which exists

encumbrances of $53,002.46. The equity is, therefore, $86,997.54. Respondent shall retain the home as his sole and separate property and pay petitioner one-half (1/2) the equity, i.e. the sum of $43,498.77.

10. Respondent's military retirement is community property but at a presently undetermined amount. Petitioner shall be entitled to receive one-half of respondent's military retirement directly attributable to the years of marriage, June 14, 1959 until separation occuring sometime between February 25, 1978 and March 13, 1978. The question remains as to when respondent's military time commenced for retirement purposes, October 13, 1957 (entry date) or June 3, 1959 (graduation from West Point). The exact calculations are left to the parties subject to this court's continued jurisdiction to establish the exact figures should the parties be unable to do so at the time retirement commences.

11. Household goods, furnishings, jewelry and all community property, personal property remaining in possession of respondent shall be appraised and divided equally. The court shall retain jurisdiction over this matter.

12. Respondent shall continue to reside in a $140,000.00 home and send daughter JENNIFER to the private school, Robert Louis Stevenson.

13. The outstanding cash value of insurance policies shall be determined as soon as possible and respondent shall pay one-half (1/2) of said cash value to petitioner.

14. Both parties are restrained from being in and about the residence of the other except upon reasonable notice for visitation purposes and with permission. Telephone communication with the respective daughters is limited to the hours of 8:00 a.m. and 8:00 p.m.

Any issue left unresolved in this Order shall remain within the jurisdiction of the court.

DATED: NOV 15, 1978

E. J. LEACH
JUDGE OF THE SUPERIOR COURT

REITH, WELLINGTON &
BEBERMEYER
Attorneys at Law
444 Pearl Street
Post Office Box 188
Monterey, California
93940
Telephone: 375-3181

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JUN 13 10 03 AM '79
MONTEREY OFFICE
ERNEST A. MAGGINI
COUNTY CLERK
DEPUTY

Attorney(s) for
Respondent

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MONTEREY

In re the marriage of	) CASE NUMBER
	) MDR 10439
Petitioner:	)
	) NOTICE OF
BARBARA LEE YATEMAN	) ENTRY OF
	) JUDGMENT
and	) (MARRIAGE)
	)
Respondent:	)
	)
SIDNEY HERSH YATEMAN	)
	)

You are notified that the following judgment in this cause was entered on JUN 13 1979

( ) Pursuant to Section 668.5 of the Code of Civil Procedure

(X) Judgment Book No. 21, Page 605

( ) Interlocutory Judgment of Dissolution of Marriage

(X) Final Judgment of Dissolution of

of Marriage

( ) Final Judgment of Legal Separation

( ) Final Judgment of Nullity

( ) Order on OSC or Motion

( ) Modification

( )

ERNEST A. MAGGINI, CLERK

By LISA G. EISEMANN, Deputy

DECLARATION OF MAILING

On the date stated below, I mailed (by first-class mail or airmail, postage prepaid) a copy of this Notice of Entry of Judgment (Marriage) to the persons entitled thereto, addressed as follows:

REITH,WELLINGTON
& BEBERMEYER
P. O. Box 188
Monterey, CA 93940

PATRICK PIGGOTT
Attorney at Law
P. O. Box 6448
Carmel, CA 93921

Dated JUN 13 1979

ERNEST A. MAGGINI,
CLERK

By LISA G. EISEMANN,
Deputy

NOTICE OF ENTRY OF JUDGMENT (MARRIAGE)
EXHIBIT B

REITH,WELLINGTON
& BEBERMEYER
Attorneys at Law
444 Pearl Street
Post Office Box 188
Monterey, California
93940
Telephone: 375-3181

Attorney(s) for
Respondent

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JUN 12 2 42 PM'79
MONTEREY OFFICE
ERNEST A. MAGGINI
COUNTY CLERK
DEPUTY /s/
Lisa G. Gsemann
ENTERED
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MONTEREY OFFICE
ERNEST A. MAGGINI
COUNTY CLERK
DEPUTY /s/
D.Duncan

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MONTEREY

In re the marriage of	)CASE NUMBER
	)MDR 10439
Petitioner:	)FINAL JUDGMENT
	)(MARRIAGE) OF
BARBARA LEE YATEMAN	)DISSOLUTION
	)
and	)
	)
Respondent:	)
	)
SIDNEY HERSH YATEMAN	)

The court acquired jurisdiction of the respondent on April 13, 1978 by:

( ) Service of process on that date, respondent not having appeared within the time permitted by law.

( ) Service of process on that date and

respondent having appeared.

(x) Respondent on that date having appeared.

The court orders that:

( ) Pursuant to ( ) Civil Code Section 4506(1) or ( ) Civil Code Section 4506(2), a Judgment of Legal Separation and such other orders as are set out below be entered.

( ) Pursuant to ( ) Civil Code Section 4400, ( ) Civil Code Section 4401, or ( ) Civil Code Section 4425 ( ), a Judgment of Nullity and such other orders as are set out below be entered, and that the parties be restored to the status of unmarried persons.

(x) Pursuant to (x) Civil Code Section 4506 (1) or ( ) Civil Code Section 4506 (2), a Final Judgment of Dissolution be entered, and that all of the provisions of the interlocutory

judgment, which was entered on Nov. 15, 1978, except as otherwise set out below, be made binding the same as if set forth in full, and that the parties be restored to the status of unmarried persons.

Dated JUN 12 1979

/s/ Ralph Drummond
RALPH M. DRUMMOND
Judge of the Superior Court

APPENDIX D

STATUTES INVOLVED

California Civil Code §4800(a):

> Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, the court shall, either in its interlocutory judgment of dissolution of the marriage, in its judgment decreeing the legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community property and the quasi-community property of the parties, including any such property from which a homestead has been selected, equally. For purposes of making such division, the court shall value the assets and liabilities as near as practicable to the time of trial, except that, upon 30 days' notice by the moving party to the other party, the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and prior to trial to accomplish an equal division of the community property and the quasi-community property of the parties in an equitable manner.

Code of Civil Procedure §473:

AMENDMENTS PERMITTED BY COURT; ENLARGEMENT OF TIME TO ANSWER OR DEMUR; CONTINUANCE, COSTS; RELIEF FROM JUDGMENT, ETC., TAKEN BY MISTAKE, INADVERTENCE, SURPRISE, OR EXCUSABLE NEGLECT; CLERICAL MISTAKES IN JUDGMENT OR ORDER; VACATING VOID JUDGMENT OR ORDER

ALLOWABLE AMENDMENTS

The court may, in furtherance of of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code.

CONTINUANCE

When it appears to the satisfaction of the court that such amendment renders it necessary, the court may postpone the trial, and may, when such postponement will by the amendment be rendered necessary, require, as a condition to the amendment, the payment to the adverse party of such costs as may be just.

RELIEF FROM JUDGMENT OR ORDER TAKEN BY MISTAKE, ETC.

The court may, upon such terms as may be just, relieve a party or his or her legal representative from a judgment, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a

copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken; provided, however, that, in the case of a judgment, order or other proceeding determining the ownership or right to possession of real or personal property, without extending said six months period, when a notice in writing is personally served within the State of California both upon the party against whom the judgment, order or other proceeding has been taken, and upon his or her attorney of record, if any, notifying said party and his or her attorney of record, if any, that such order, judgment or other proceeding was taken against him or her and that any rights said party has to apply for relief under the provisions of Section 473 of the Code of Civil Procedure shall expire 90 days after service of said notice, then such application must be made within 90 days after service of such notice upon the defaulting party or his or her attorney of record, if any, whichever service shall be later. No affidavit or declaration of merits shall be required of the moving party.

CLERICAL MISTAKES; VACATING VOID JUDGMENT OR ORDER

The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its

judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order.